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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 182

ROBINS DRY DOCK & REPAIR COMPANY

Petitioner

against

GEORGE FLINT, SAMUEL W. COLLINS AND LUDWIG T. BRIHM, Etc.

Respondents

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 102

ROBINS DRY DOCK & REPAIR COMPANY
Petitioner

AGAINST

GEORGE FLINT, SAMUEL W. COLLINS and LUDWIG T. BREHM, etc
Respondents

BRIEF FOR RESPONDENTS

Mack, C. J., writing the opinion of the Circuit Court of Appeals, said (R. 40-41):

"Clearly, the result reached involves no injustice to respondent. Its liability for its tortious act is the actual damage done to the combined interests in the ship. The measure of the total recovery is the market value of the loss of the use. If there had been no charter, the entire loss would have been sustained by the owner; therefore he could have recovered that amount for himself. The wrongdoer has no interest in and should not benefit because of the contractual obligations of the shipowner to the charterer or the absence of any liability of the owner to the charterer for respondent's negligence. This non-liability of the owner is neither a test nor a measure of the wrongdoer's liability, for though the owner be not directly liable to the charterer, he may nevertheless be liable over to him as a trustee for so much of the recovery from the wrongdoer as exceeds his own personal loss."

The petitioner, at page 18 of its brief, states:

"Decision was apparently placed on the ground that in obtaining a release from the shipowners without paying as consideration therefor an amount equal to the full market value of the vessel's use for fourteen days, the petitioner participated in a breach of trust owing from the shipowners to the respondents, and so became liable in admiralty as for a tort."

And again at page 20 the petitioner's brief states:

"The so-called tort as to the charterers seems to have consisted in the petitioner's obtaining a release from the shipowners without paying the full amount of the damages that the shipowners might possibly have recovered."

The petitioner thus misconceives the basis of the decision of the Circuit Court of Appeals. The decision cannot fairly be said to suggest that the shipowner was guilty of breach of trust or that the petitioner participated in a breach of trust. The decision does suggest that if the shipowner had collected from the petitioner the full market value of the steamer's use during the period of detention, then the owner would have been bound to turn over to the charterers (respondents-libellants) so much of the same as exceeded what the charterers would have been bound under the charter to pay the owner for the use of the steamer during such period of detention—except for the negligence of the petitioner which prevented use.

Since the owner did not collect, as it might have done, the full market value from the petitioner, the decision of the Circuit Court of Appeals was to the effect that the charterers could enforce directly the cause of action which the owner in the nature of a trustee might have chosen to enforce for their benefit. The owner, instead of enforcing the cause of action for the full amount and then distributing to the char-

terers (respondents) their proper share, chose to accept from the petitioner against a release only the amount which it was entitled to retain for itself. This release did not purport to cover or discharge any claim or portion of the claim to which the charterers might be entitled (R. 18, 38). Indeed, had it pretended to cover more than the owner's share it would have been ineffective, because a release without consent of the beneficiary is not valid. *See Perry on Trusts*, 5th Ed., Sec. 520; *McClurg v. Watson*, 13 Penn. St. 439.

The only effect of the owner's release was to remove from the case that portion of the damage to which the owner was itself entitled, and the cause of action for damage so far as the charterers were interested therein, *i. e.*, the chose in action which existed for their benefit, persisted until they should receive satisfaction, irrespective of whether the owner should enforce that chose in action and turn the proceeds over to them, or whether they should themselves enforce the chose in action, which by virtue of the charter came to them on the shipowner.

Since admiralty favors suit by the real party in interest, *Frets v. Bull*, 12 How. 466, 468, there can be no objection to the charterers suing in their own name or to the owner not being joined as a party libellant. Joinder of the owner would have been pure ceremony, as the owner no longer had any interest for itself, and the charterers were not asserting any claim against the owner.

No point was made in the assignments of error that the owner had not been made a party. Such suggestion of error is not admissible now. *The Commander-in-Chief*, 1 Wall. 43, 52-53. The point was not raised in the answer, which would have been the proper practice. *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686, 687.

The misconception of the basis of decision of the Circuit Court of Appeals is emphasized by the final paragraph of the petitioner's analysis at page 17 of its brief

"4. Therefore, having settled with the shipowners by paying an amount less than the full market value of the vessel's use during the period of detention, the petitioner became liable to the respondents."

This quotation hardly allows to the Circuit Court of Appeals the weight to which its reasoning appears entitled. It was not because the petitioner had paid to the owner less than the full market value of the vessel's use that the petitioner was held liable to the respondents. The petitioner's payment to the owner had nothing whatever to do with arising of its liability. That liability existed to the fullest extent from the moment of the negligent act. The owner settled with the petitioner for that portion of the damage which belonged to the owner, leaving that portion which belonged to the charterers still outstanding. All that the Circuit Court of Appeals held, we repeat, was that the charterers as the real parties in interest were entitled to enforce the chose in action which existed for their benefit—which could have been enforced by the owner, which would then have been under the duty to turn over the proceeds to the respondents. What might have happened if the suit had been brought by the owner and the owner had refused to turn over to the charterers their proper share of the recovery is not in issue in this suit. This is in no respect a suit for breach of trust; it is a suit to enforce a chose in action for detention damages caused by the petitioner's negligence, not for physical damage to the ship.

This foundation of liability applied by the Circuit Court of Appeals is by no means novel, but is well supported by

decisions of this Court in analogous cases. We refer to those cases where underwriters are allowed to recover in their own name for damages caused to the insured. In *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 462, this Court said:

"From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the shipper. *The Potomac*, 105 U. S. 630, 634; *Phenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 321.

"In the present case, the libellant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier."

See also *The Potomac*, 105 U. S. 630, 634. In *The Propeller Montello* v. *Wallison*, 17 How. 152, 155, this Court said:

"It is true, that in courts of common law the injured party alone can sue for a trespass, as the damages are not legally assignable; and if there be an equitable claimant, he can sue only in the name of the injured party; whereas, in admiralty, the person equitably entitled may sue in his own name. But the same reasons by [which] the wrongdoer cannot be allowed to set up as a defence the equities between the insurer and insured, equally apply in both courts. The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit, at the instance of any merely equitable claimant. If notified of such a claim before payment, he may compel the claimants to interplead; otherwise, in making reparation for a wrong done, he need look no further than to the party injured. If others claim a right to stand in his place, they must intervene in proper time, or lose their recourse to the respondent."

In cases where the interest of the underwriter is less than the total loss to be sued for, joinder of the owner is required, since the owner in such case has an interest in enforcing the claim, which is partly for his account. But if the owner's interest has been released the underwriter may maintain his suit for the amount of his interest, as to which see *Fairbanks v. Metcoa Ins. Co.*, 94 Fed. 686, 688, where the Circuit Court of Appeals for the Eighth Circuit said:

"It will be open to the libellant, when the record is returned to the District Court, to amend its libel, and show, if it can, that the excess of damages over the sum for which it sues has been paid, released, or otherwise extinguished, so that the claimants are no longer liable to an action therefor at the suit of anyone."

The interest of the respondents in the detention damage was of a rank and character no less than the interest of an underwriter in physical damage. The underwriter secures his interest by the contract of insurance, the charterer secures his interest by the charter party, which gives to him the exclusive use and direction of the ship and all her earning power.

If the respondents had participated with the petitioner in a tort with respect to the vessel and her use and been held liable therefor, they could have enforced contribution from the petitioner for the damage. *Erie Railroad Co. v. Erie Transportation Co.*, 204 U. S. 220, 235; *The Ira M. Hedges*, 218 U. S. 264, 270-271. See also *Geerts v. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489. Being innocent sufferers from the petitioner's negligence and not participants therein, why should the respondents have the principle of contribution enforced against them?"

FIRST POINT

THE DAMAGES ARE NOT SPECULATIVE OR REMOTE, BUT WERE LIMITED TO THE RESPONDENTS' SHARE OF THE MARKET VALUE OF THE USE OF THE STEAMER.

In *The Potomac*, 105 U. S. 630, 631 632, this Court said:

"* * * the owners of the injured vessel are entitled to recover for the loss of her use, while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered."

In *The Conqueror*, 166 U. S. 110, 127, this Court said:

"The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market."

See also *Sedgwick on Damages*, 9th Ed., Sec. 593.

The authorities are collected in 39 Harv. L. Rev. 760 762, wherein is pointed out the difference between the "objective" value and "subjective" value theories of damage arising from loss of use of a vessel. The rule of objective value is enforced in this country, and has been at times in England until the decision in *The Susquehanna*, 134 L. T. R. 45, which petitioner mentioned in its application for certiorari (p. 5).

Although that decision is not in accord with the law of this country on similar facts, nevertheless, if it could have been shown in that case that the plaintiff would have chartered the vessel, recovery could have been had on the basis of market value, just as in a similar case in this country. The *Ryanefjord* was already chartered when the detention occurred.

The market value of the use of the steamer during the detention caused by the petitioner's negligence is a fair and certain basis of damages. Assuming for argument that the charter hire collectible by the owner from the respondents had been higher than the market rate prevailing at the time of detention, it goes without saying that the petitioner would not have been liable to the owner in excess of the market value unless the charter rate had been specifically brought to the petitioner's attention and made the basis of special damages. It cannot make any difference in principle that the market value happened to be higher than the owner's charter rate. It was still the market value and not the charter rate which should be taken as the measure of damage, irrespective of whether the claim is considered to be in contract or in tort. The petitioner has never claimed that it undertook the work on the steamer in contemplation of the charter or that it had any notice of the same until after the accident. On page 2 of its brief it is stated:

"The petitioner had no notice of the respondent's charter party until after the accident."

Detention damage is recoverable as the proximate result of incapacitating a steamer by negligent workmanship quite as much as by a collision, and the true measure thereof is the market value of the loss of use. In 1917 such market value was high because of the extraordinary demand for steamers, a fact which was then well known to the general public and undoubtedly also to the petitioner as well as all others who had anything to do with the shipping business.

The negligence of the petitioner was expressly admitted in the answer (R. 4). No error was assigned to the amount of the damage. By making payment to the owner the petitioner recognized its liability at least to the extent of the

owner's share in the market value of the use (limited by the charter). There is no more reason for contending that the charterer's share of the market value is remote damage than so to contend with respect to the owner's share thereof.

The suggestion at page 24 of the petitioner's brief that the respondents might have made themselves parties to the repair contract or stipulated with the owner that the ship should be restored to service within a specified time merely begs the question. It is true enough that if the respondents had protected themselves in some other way (had that been possible or practical) they might not have been obliged to sue the petitioner; that does not mean that the petitioner's total liability for negligence would have been any less. Nor does this suggestion support petitioner's contention that the damages were remote.

SECOND POINT

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT AND IN ACCORD WITH ESTABLISHED PRINCIPLES.

Judge Mack's opinion shows that no injustice was done the petitioner, because it was not held liable to pay *in toto* more than it could have been required by the owner to have paid in the first instance, in accord with the authorities we have mentioned. So far from any injustice to the petitioner being intended or possible, there would be serious injustice to the respondents if recovery were denied.

The decision of the Circuit Court of Appeals was discussed and approved in 40 Harv. L. Rev. 302-305 (Dec. 1926).

The petitioner was advised of the respondents' claim at least by August 10, 1917 (R. 16) and made the payment to

the owner in December (R. 18), then withholding from the owner (it is fair to assume on account of the respondents' notice) all damages which exceeded the owner's interest.

The respondents sought to recover their loss from the owner of the steamer but in this were not successful, liability being denied on the ground that the owner performed its full duty under the charter by selecting a repair yard of good repute. *The Ripmeford*, 271 Fed. 682.

In *Hines* v. *Sungstad Steamship Company*, 206 Fed. 502, a time charterer was allowed by the Circuit Court of Appeals for the First Circuit to recover damage sustained by it for loss of use of the vessel, through damage to the vessel's mast caused by the negligence of a third party. The amount of the damage was the amount of hire which the charterer had been obliged to pay to the owner during the period of loss of use of the ship, the situation not being such as to result in cessation of hire under the breakdown clause. It does not appear that the charterer had any damages beyond this amount, but if there had been such the principle on which recovery was allowed would have given the time charterer damages for the loss of use of the vessel of the same nature as were allowed in this case.

In *Dominion Coal Co., Ltd.* v. *Waskinonge S. S. Co., Ltd.* [1922] 2 K. B. 132, it was held that requisition charter hire was apportionable between owner and time charterer.

In *The Winkfield* [1902] P. 42, the Court of Appeal allowed the Postmaster General to recover the full value of mail which had been destroyed by a negligently colliding ship, and this notwithstanding that the Postmaster General was not liable to the owners of the mail for the loss, although it was recognized that his recovery from the *Winkfield* was held by him as trustee for the owners.

THIRD POINT

THE RELATION OF THE RESPONDENTS TO THE BJORNEFJORD WAS SUCH AS TO SUPPORT RECOVERY OF DAMAGES BASED ON THEIR LOSS OF USE DURING THE PERIOD OF DETENTION CAUSED BY THE PETITIONER'S NEGLIGENCE.

Although the theory and reasons of the Circuit Court of Appeals seem sufficient to support its decision, it is nevertheless proper to put before this Court other considerations to support the result reached by the decision.

The petitioner makes the point that as the respondents had no property in the vessel they had no right to maintain suit for damage. This might be true with respect to physical damage but it cannot apply to damage for detention, i. e., loss of use, to which the respondents were solely entitled under the charter. For this use they were to pay the charter price. The respondents' five year time charter was "property", intangible though it might be, as distinguished from the physical property about which the petitioner argues. A portion of such property was admittedly destroyed by the detention which the petitioner's negligence caused. The contract for use of a vessel is property just as is a contract for construction, *Brooks Scanlon Corp. v. United States*, 265 U. S. 106.

The respondents had an interest in the vessel and the extent thereof is apparent from the time charter itself. That charter, dated September 13, 1913, (Ex. 1, R. 14) hired the steamship to the respondents for a period of five years, the steamer to be placed at their disposal at a United States port north of Hatteras, to be employed in carrying lawful merchandise, as they might direct. They were required (Clause 2) to provide

and pay for all coal, port charges, pilotages, agencies, commissions, consular charges, and all other charges except those provided to be paid by the owners, and the owners undertook (Clause 1) to maintain the vessel in a thoroughly efficient state in hull and machinery for and during the service. The respondents agreed to pay for the use and hire of the vessel £1,200 sterling per calendar month (Clause 4). Cargoes were to be laden and discharged in any dock or at any wharf or place that they should direct, and they were to have the disposal of the whole reach of the vessel's holds, decks and usual places of loading and accommodation (Clauses 7, 8). By Clause 9 it was provided that the captain was under the orders and direction of the respondents as regards employment, agency or other arrangements, and they agreed to indemnify the owners from all consequences or liabilities that might arise from the captain signing bills of lading. The owners undertook by Clause 10 to make a change in the appointments in case the respondents should have reason to be dissatisfied with the conduct of the captain, officers or engineers. They had permission to appoint a supercargo (Clause 11). By Clause 19 they were expressly given a lien on the ship for all moneys paid in advance and not earned. The time charterer's operations as receiver of cargo can also subject the ship to liens. *The Capitaine Faure*, 10 Fed. 2nd, 950, certiorari denied, 271 U. S. 684.

These several detailed provisions, among others, show that the respondents had the absolute direction and control of the vessel during the entire charter period, which direction and control could hardly have been more absolute even if the vessel had been delivered into their actual physical custody. The relation was such as to make them the carriers of such cargoes as should be loaded on the vessel. *The Centurion*,

57 Fed. 412; *Olsen* v. *United States Shipping Co.*, 213 Fed. 18. They had what was aptly described by Judge Hough in *The Santona* as "an estate carved out of the ship and handed over for a specific term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys, and the use of the vessel, master, and crew, for the advancement of the charterers' gains." 152 Fed. 516, 518.

Judge Hough's language in *The Santona* is in no wise limited by his remarks in *The Saturnus*, 250 Fed. Rep. 407, which was not a case of a charter at all (or if so only for a voyage), where it was held that there was no maritime lien on the vessel with respect to refusal to load certain cargo at a certain place, even after the cargo was later received on board. This was the view also set forth in the *Osaka* case, 260 U. S. 490, which involved a voyage charter and not a time charter. The question here does not involve maritime liens resulting from union of ship and cargo, which were the sole points at issue in the *Osaka* and *Saturnus* cases. It is apparent from the discussion of long decided cases on pages 497 499 of the *Osaka* decision that no new point was therein decided by this Court.

It is not necessary in this case to enter upon all the niceties of maritime liens, for as between the respondents and the petitioner the question is purely collateral. Whether the libellants had a strict maritime lien or not, their position was at least analogous to that of a mortgagee and a mortgagee having neither ownership nor possession was held entitled by Judge Addison Brown to sue for collision damages. *The Grand Republic*, 10 Fed. 398.

The time charterer's relation to the vessel is such that equity will interfere by requiring specific performance, or at

least enjoining acts which would prevent performance of a charter. In *Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co.*, 239 Fed. 603, Mack, *C. J.*, sitting in the Circuit Court of Appeals for the Seventh Circuit, affirmed an injunction order restraining the sale of nine steamers which had been chartered to transport coal on the Great Lakes in 1916, 1917 and 1918, and intimated that specific performance of the charter would be granted on proof of certain facts (pp. 608-610). The vessels were referred to as "these specific, and under the then and now prevailing conditions, unique chattels". The conditions referred to by Judge Mack were those arising out of the war, which made any vessel, practically speaking, "unique" property. In that sense also the *Bjornefjord* was "unique" at the time of her detention in August, 1917, and had her owner refused to continue performance of the charter most likely specific performance could have been enforced. See *Lord Strathcona SS. Co. v. Dominion Coal Co., Ltd.* [1926] A. C. 108, where the charter was considered by the Privy Council to be a servitude.

It is not seen that the question as to specific performance of a charter differs from that of a contract of sale. Such a question with respect to sale was determined by Judge Hough in the District Court, in *American Union Line, Inc. v. McIntyre Lumber & Export Co.*, (unreported) Equity 15-90, April 17, 1918, in which he said:

"The nature of the action, as I conceive it, is a bill for the specific performance of a contract for the sale of a vessel, and this I regard as an established, though small, subhead of Equity jurisprudence. If I had any doubt on this point of jurisdiction it would be entirely resolved in favor of the right to bring the suit, by the notorious conditions of today, which make ships capable of deep water traffic quite as peculiar and unique as some of the heirlooms which are usually referred to when considering this branch of equitable jurisdiction."

See also *Behnke* v. *Bede Shipping Co., Ltd.*, 32 Com. Cas. 134, 143; *Williston on Sales*, 2d Ed. Sec. 602; *Menier* v. *Donald*, 98 Misc. 684, and authorities discussed in L. R. A. 1918 E. 621.

The charterer has such interest in the use and employment of the vessel that he can secure marine insurance against loss of charter hire and profits under the charter, Arnould on Marine Insurance, 11th Ed., Sec. 262, Note (*m*), and even under a voyage charter the charterer has been held to have an insurable interest. *South American Shipping Co* v. *Importers & Exporters Ins. Co.*, 9 Fed. 2nd 304.

In *Elliott Steamtug Company, Ltd.* v. *The Shipping Controller* [1922] 1 K. B. 127, which petitioner cites (pp. 13 14), Scrutton, *L. J.*, was of opinion that the charterer's loss was direct and he recognized the propriety of apportionment between owner and charterer (142).

FOURTH POINT

MANY DECISIONS HAVE ALLOWED RECOVERY BY A TIME CHARTERER WITHOUT BASING THE SAME ON DERIVATIVE RIGHT THROUGH THE OWNER.

The several decisions which we shall now cite reached the same result as did the Circuit Court of Appeals, but on different grounds. The most recent of those decisions was *The Aquitania*, 270 Fed. 239 (D. C. So. D. N. Y.), which involved a collision in New York Harbor February 28, 1919, between the *Aquitania* and the *Lord Dufferin*, the latter vessel being then under time charter for a period of five years to Gaston, Williams & Wigmore Steamship Corporation. Said time charterer sued for the damages caused to it by the

collision which were claimed to amount to $1,000,000. The question was fully dealt with by Judge Mayer in a careful opinion in the course of which he stated (240 241):

"The consideration of the question involved starts with the impetus that the aim of the admiralty courts is to work out principles which make for justice and seek to avoid the turning away of a suitor without remedy.

"An owner, possessing the full estate in a vessel, can, of course, recover for the loss of use of his vessel, damaged in a collision by the fault of another. The question is, whether, when an owner for a consideration has parted with the use of his vessel to a time charterer, the fact will justify a full release to the claimant of the damages sustained for loss of use of the vessel. The damages are the same, and thus the inquiry is whether the legal position of the time charterer is such as to debar the recovery sought.

"There are four cases in which recovery has been had by the time charterer under circumstances which can be justified only on the theory pressed by libellant in the case at bar. In these cases, however, the question here involved is not precisely discussed, as will appear *infra*."

Judge Mayer then referred to several decisions of other courts, among which were *The Beaver*, 219 Fed. 134, where the time charterer of the *Selja* was allowed by the Circuit Court of Appeals for the Ninth Circuit to recover from the *Beaver*, which had collided with the *Selja*, for loss of bill of lading freight and physical property on the *Selja*. He also cited *Hines* v. *Sangstad Steamship Company*, 266 Fed. 502, the facts of which are stated *supra*, page 10.

After analyzing the decisions referred to, Judge Mayer continued (270 Fed. at 244):

"This brings us to the principle which must be applied or rejected, and that is whether the capacity of the vessel for earning freight and freight moneys, and the use of the vessel, master and crew to that end, constitute property. It is urged that it does not principally, because under this form of charter there is no demise. But a demise carries with it

control of the vessel for all purposes. It makes the demisee (i. e., charterer, where there is a demise) the owner *pro hac vice*.

"But there is no inconsistency nor illogical proposition involved in a holding that, under a charter such as this, while in respect of navigation and care the ship is the owner's, nevertheless, in so far as its capacity to earn freight is concerned, it is the charterer's."

He also quoted from Judge Hough's decision in the *Santona*, 152 Fed. 516, 518.

The petitioner sought in the court below to distinguish the *Aquitania* decision on the ground that the damage to the *Lord Dufferin* was sustained while she was in service under the charter and that the damage to the *Bjornefjord* happened while she was out of service. Such ground of distinction is immaterial as the *Bjornefjord* remained constantly under the charter and the period she was out of service was a part of the five year term. The charterer was merely excused by Clause 22 from paying hire during the time the ship was in dry dock and not rendering service to the charterer. In all other respects the charter remained in full force and the duty of the owner thereunder remained as effective as if the ship had been continuously in operation.

The petitioner is in error in claiming that the steamer was "withdrawn". The owner's only right of withdrawal was for the respondents' failure to pay hire (clauses 6 and 29). Neither the drydocking clause (22) nor the breakdown clause (16) allowed withdrawal. They merely provided for suspension or cessation of hire.

The time charterer's right has also been upheld by the Mixed Claims Commission between the United States and Germany, with respect to vessels sunk by submarines. In the case of the *Vinland* a decision was rendered by Umpire Parker holding that the American charterer of a destroyed

vessel was entitled to an award to the extent of its interest in the reasonable market value of the vessel at the time of destruction. The decision is well considered and clean cut. The Umpire said (Mixed Claims Commission, Administrative Decision No. VII, pp. 335-337):

"Likewise, as between the owner and the charterer the terms of the particular charter are important in determining the basis of apportionment between them of the amount of damage for which a third party is liable. But this apportionment does not affect the aggregate amount of such third party's obligation when established under appropriate rules for measuring damages applicable to cases where vessels are injured but not destroyed. On the whole, the rules sought to be evolved from these cases and applied to claims put forward on behalf of charterers of destroyed vessels are not particularly helpful in determining whether such claims fall within or without the terms of the Treaty of Berlin, or in measuring the claimant's recoverable damage, if any, under that Treaty.

"As applied to the loss of tonnage the tangible things destroyed are ships. The value of their use at the time and under the conditions then existing has been taken into account by this Commission as a factor in determining the market value of tonnage lost. Where, under the terms of a then existing charter party, the charterer was at the time of the loss entitled to the use of the ship on terms which would have had the effect of reducing the price which the owner could have obtained for it *if sold burdened with the charter*, then at the time of the loss the charterer had a pecuniary interest in that particular ship, a *jus in re*, a property interest or property right the subject matter of which was the ship, an interest entering into and inhering in the ship itself. Such a right and interest is an encumbrance on the ship in the sense of constituting a limitation on the owner's right to possess, control, and use it and as affecting the price at which it could be disposed of in the market burdened with the charter. It is an interest in the subject matter which the municipal courts will protect against both the owner and those claiming under him with notice thereof. In cases where such interest existed at the time of the loss the measure of damages remained unchanged but the market value of the whole ship must be apportioned between the owner and the

charterer in proportion to their respective interests therein; and the United States is entitled to an award on behalf of (a) the owner, if an American national at the requisite dates, in an amount equal to the price for which the ship could have been sold on the market at the time of loss *burdened with the charter*, with 5% interest thereon from November 11, 1918, or from the date of loss if destroyed at a later date, and (b) the charterer, if an American national at the requisite dates, in an amount equal to the difference if any between the said award on behalf of the owner and the reasonable market value of a free ship not burdened with the charter, with interest on the amount of this difference at the same rate and from the same date. This does not change the rule that so far as Germany is concerned her obligation is limited to making compensation for the tangible property destroyed — the ship — and that such compensation is measured by the reasonable market value of the ship at the time and place of its destruction plus interest thereon computed in accordance with the rules announced in Administrative Decision No. III. This rule for the apportionment of damages will be applied by this Commission in a case where an American-owned ship had been chartered to an alien on terms which operated to reduce its market value encumbered with the charter, and the owner's damage will be assessed at the reasonable market value of the ship so encumbered, with interest thereon. Conversely, in a case where the owner is not an American national, Germany will nevertheless be held obligated to make compensation to an American charterer to the extent of the difference, if any, between the reasonable market value of the ship free of the charter and the reasonable market value of that ship encumbered with the charter, with interest on the amount of this difference."

The *Vinland* case is also reported in 1925 A. M. C., 1141.

It is no longer so necessary that the party claiming damages shall stand in some relation of privity with the *tort feasor*, which is the burden of the decisions cited by the petitioner. A good illustration is the decision in *Johnson* v. *Cadillac Motor Car Co.*, 261 Fed. 878, where the Cadillac Company was held liable to a purchaser through a dealer for damage resulting from a defective wheel. This was reversal of the position taken on an earlier appeal in the same

case, 221 Fed. 801. The court in its later decision conformed to *Macpherson* v. *Buick Motor Co.*, 217 N. Y. 382, wherein Judge Cardozo had emphasized the necessity of taking modern development into account. See particularly the discussion of authority on pages 388-394 and also his remarks in *Glanzer* v. *Shepard*, 233 N. Y. 236, 238-242. In *Quackenbush* v. *Ford Motor Co.*, 167 App. Div. (N. Y.) 433, this doctrine was applied to damage to property.

FIFTH POINT

RECOVERY IS ALSO PROPER ON THE GROUND THAT THE RESPONDENTS WERE BENEFICIARIES OF THE SHIPOWNER'S CONTRACT WITH THE PETITIONER FOR DRY DOCKING AND REPAIRING THE STEAMER.

The petitioner's answer (VII and VIII, R. 5) shows that the dry docking of the steamer and the repairing of her cracked propeller were done to enable the shipowner to perform its charter party with the respondents. The charter party obligated the shipowner to maintain the steamer "in a thoroughly efficient state in hull and machinery" (clause 1) and provided that she should be dry docked for certain purposes, whenever charterers and master thought necessary, at least once in every six months (clause 22).

The shipowner, being without facilities of its own for doing this work, contracted with the petitioner to do the same.

This presents a clear case of one with a legal duty (here under the charter) obtaining from another a promise for the performance of work which would fulfill that duty. It is

well settled in New York and elsewhere that wherever a debt or duty is owing by a promisee to a third party, the latter may sue the promisor upon the promise. In *Vrooman* v. *Turner*, 69 N. Y. 280, 284, the Court said:

"A legal obligation or duty of the promisee to him, will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor."

In *Strong* v. *American Fence Co.*, 245 N. Y. 48, the defendant in its contract with the Government for construction of a hospital undertook to furnish a surety bond "for the prompt payment to all persons or parties furnishing labor or materials required or used in the prosecution of the work". The bond was not given. The plaintiff, who supplied labor and material to a subcontractor who defaulted, was held entitled to recover damages for the defendant's breach of contract in failing to give a bond. Judge Cardozo said:

"A beneficiary of the promise, a laborer or materialman for whose protection it was given, has a right of action for the damages resulting from the breach (*Lawrence* v. *Fox*, 20 N. Y., 268; *Seaver* v. *Ransom*, 224 N. Y., 233). The promise was exacted by the promisee in fulfillment of a legal duty. It was exacted for the very purpose of assuring to the plaintiff and to others similarly situated the benefit of the security established by the statute."

In the case at bar the shipowner's contract with the petitioner was made solely for the purpose of fulfilling its duty under the charter party, which was as much a legal duty as one imposed by statute. The petitioner's ignorance of that duty at the time of contracting is immaterial, the test being the *existence* of a legal duty by the promisee to

the third party. The presence of such duty is a substitute for privity. *Vrooman* v. *Turner*, *supra*.

In *German Alliance Insurance Company* v. *Home Water Company*, 226 U. S. 220, cited by petitioner, this Court in denying recovery pointed out the absence of any obligation from the promisee to the third party in whose shoes the plaintiff stood, saying (230 231):

"Here the city was under no obligation to furnish the manufacturing company with fire protection, and this agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively."

In *Johns* v. *Wilson*, 180 U. S. 440, a grantee who had agreed with a mortgagor to pay the notes secured by the mortgage was held liable to the mortgagee for a deficiency upon the sale of the mortgaged premises.

In *National Bank* v. *Grand Lodge*, 98 U. S. 123, this Court, after stating that as a general rule privity of contract between plaintiff and defendant is necessary to the maintenance of an action of assumpsit, said:

"No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person."

This exception applies to the case of the petitioner which by negligent breach of its repair contract became liable for certain damages, a portion of which in equity belonged to the respondents, but have been retained by the petitioner without justification.

In *Pennsylvania Cement Co.* v. *Bradley Contracting Co.*, 7 F. (2d) 822, and in *Town of Readsboro* v. *Hoosac County*, 6 F. (2d) 733, third parties were held entitled to sue on contracts made for their benefit. These decisions referred to *Hendrick* v. *Lindsay*, 93 U. S. 143, 149, where this Court said that "the right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country." See also *Compagnie Francaise* v. *Bonnasse*, 19 F. (2nd.) 777, 779; *Glanzer* v. *Shepard*, 233 N. Y. 236; Cardozo, *Growth of the Law*, 77 78

The shipowner's release is no bar to the respondents' claim, *Gifford* v. *Corrigan*, 117 N. Y. 257; *Knowles* v. *Ercin*, 43 Hun. 150, aff'd., 124 N. Y. 633.

SIXTH POINT

There is no lack of admiralty jurisdiction

Point V of the petitioner's brief contends that this suit is not within the admiralty jurisdiction, notwithstanding that Art. VI of the answer to the libel admitted in express words "the admiralty and maritime jurisdiction" (R. 4).

Petitioner seeks to minimize this admission by relating the same to allegations of the libel with respect to the repair contract, but taking no account of the allegations of the libel as to negligence, which negligence was also expressly recited in the answer. In the District Court the petitioner sought to make a point of the entitling of the libel in "contract and damage", but that was rejected by the District Court as without merit. See *Dampskib, etc.*, v. *Tropical Fruit Co.*, 281 Fed. 740, 742, and *The Spica*, 289 Fed. 436, 440, both of which

hold that the admiralty court will determine the controversy on the merits regardless of technicalities of pleadings or contentions as to tort or contract.

We do not quarrel with petitioner's suggestion that specific admission of jurisdiction in tort would not by itself give the admiralty court jurisdiction if it did not otherwise exist. However, in a case where jurisdiction is once admitted by the answer and thereafter denied, the court should be deaf to any but the soundest reasons for invalidating the admission or upsetting the proceedings had.

The petitioner's contention rests on the assertion that the accident happened while the vessel was in a "graving dock", which is described as differing from a floating dry dock in the fact that the ship is floated into the dock (on navigable water) and the gates then closed and the water pumped out. There is no proof in the record as to the particular character of dock, and the language in the opinion of the District Judge was taken from the petitioner's brief in that Court.

We do not see that the particular character of dock makes any difference, as with either a floating dock or a so-called graving dock a ship floats to her resting place for repairs on navigable waters which are temporarily withdrawn. This Court has not recognized any distinction, for in the case of *The Steamship Jefferson*, 215 U. S. 130, 142, it was said:

"In reason we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, *than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land.*" (Italics ours.)

In *The Robert W. Parsons*, 191 U. S. 17, 33, this Court held that repairs to a vessel while in an ordinary dry dock were not made on land. *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171.

In *The Anglo-Patagonian*, 235 Fed. 92, *certiorari* denied 242 U. S. 636, admiralty was held to have jurisdiction of a tort which occurred while a steamer was in a stationary dry dock which had been dredged out of the land. This is shown by the testimony of Godfrey L. Smith, Engineer for Newport News Shipbuilding and Dry Dock Company, page 42 of the Record in that case (No. 701 Oct. Term 1916). A dry dock of that Company was involved in *The Steamship Jefferson*, *supra*.

In *Butler* v. *Robins Dry Dock & Repair Company*, 240 N. Y. 23, an action against this petitioner, it was held that admiralty (instead of the Workmen's Compensation Law) had jurisdiction of a tort which occurred while the vessel was in a graving dock. There the intestate, who had been engaged in fastening plates on the ship's side, was killed by a falling plate while standing on the bottom of the dock. The Court of Appeals, following decisions of this Court which it thought did not leave the matter open to doubt, held that there was no distinction for the purpose of jurisdiction between a floating dock and the so-called graving dock to which the petitioner refers.

The Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1424, was enacted for the purpose of giving to workers within the admiralty jurisdiction the benefits of compensation which theretofore had not been available to them under State laws. Opinion No. 1 of the Compensation Commission, acting under that statute, held that a marine railway by means of which a vessel is hauled out of the water onto the land was a dry dock within the meaning of the

statute, apparently considering it not to be doubtful that workers in a dry dock would receive compensation. 1927 A. M. C. 1550.

A dry dock of whatever kind, which exists for the repair of ships, cannot be regarded other than as an aid to navigation, and thus within the admiralty jurisdiction. See *The Blackheath*, 195 U. S. 361; *The Raithmoor*, 241 U. S. 166, 176.

The question in *The Eclipse*, 135 U. S. 599, cited by petitioner, was whether the Admiralty Court could wind up a trust or enforce a contract of sale of a vessel, and this Court held against such power.

SEVENTH POINT

SINCE THE COURTS BELOW HAD GENERAL JURISDICTION OF THE SUBJECT MATTER, THE SUIT SHOULD NOT FAIL EVEN IF IT COULD BE SAID THERE WAS A DEFECT IN ADMIRALTY JURISDICTION

In view of the decisions and considerations mentioned in our Sixth Point, we believe this Court will deny the petitioner's challenge of the admiralty jurisdiction. It is nevertheless proper to point out that even if the admiralty jurisdiction were defective, the courts below—and this Court, since an appeal in admiralty is a new trial, *Reed* v. *Fargo*, 241 U. S. 544—would have the right and power to give proper relief either at common law or in equity.

This is because the Federal courts have general jurisdiction of the subject matter and of the parties, and the amount involved exceeds $3000. Although the record does not indisputably show the citizenship of the respondents (the petitioner is a New York corporation), we are in position to

establish diversity of citizenship, as to which we respectfully refer the Court to copy of affidavit annexed hereto as an appendix.

It does not affect the general power of the Court that the suit may be either at law, in equity or in admiralty. *Beyer* v. *Lefevre*, 186 U. S. 114, 118. As early as the time of Chief Justice Marshall this Court transformed a suit mistakenly brought in admiralty to an action at law. See *The Sarah*, 8 Wheat. 391. This practice was recently followed by the Circuit Court of Appeals for the Second Circuit in *United States, etc.* v. *James W. Elwell & Co.*, 250 Fed. 939, 941, where it was held that the District Court had no jurisdiction in admiralty over a suit which had been brought to collect a penalty under the Harter Act, and that the proper procedure was an action at law, in view of which the Court proceeded as a court of law and disposed of the controversy. Judge Learned Hand said (250 Fed. at 941):

"If it were the law that under no circumstances could a libel in admiralty be amended into a complaint *qui tam* at common law, we would have no alternative but to dismiss the proceedings, but the rule we think is not so narrow. In *The Sarah*, 8 Wheat. 391, 5 L. Ed. 644, a libel in admiralty *in rem* had been filed for a forfeiture. The court held that, as the goods were seized on land, the District Court as a court of admiralty had no jurisdiction; but it did not dismiss the cause for that reason, but remanded with instructions to amend the pleadings and proceed as upon a libel of information *in rem* at common law. In the *Confiscation Cases*, 20 Wall. 92, 22 L. Ed. 320, the court treated the pleadings in a libel *in rem* in the admiralty as equivalent in all essential features to a libel of information *in rem* at common law, and affirmed the decree; there being no issues triable by jury. We see no reason why a libel *in personam* may not by analogy be treated as the analogue of a complaint *qui tam* at common law, and why it is necessary, therefore, to dismiss the cause for want of jurisdiction."

Certiorari was applied for in the *Elwell* case but was denied, 248 U. S. 564.

In the case at bar no questions are outstanding which could not properly be disposed of by this Court or either of the courts below without intervention of a jury. The petitioner expressly admitted negligence and no error was assigned to the amount of damages. The admission of the admiralty jurisdiction was held by the Circuit Court of Appeals in the case last cited to be an effective waiver of the right to assessment of damages by a jury (250 Fed. at 942).

The recent practice of this Court has been to permit any necessary amendment in this Court and dispose of the case here. *Norton* v. *Larney*, 266 U. S. 511, 516; *Realty Holding Co.* v. *Donaldson*, 268 U. S. 398, 400.

LAST POINT

It is respectfully submitted that the decree should be affirmed.

H. Alan Dawson
Burlingham, Veeder,
Masten & Fearey
Proctors for Respondents

Roscoe H. Hupper
H. Alan Dawson
William J. Dean
of Counsel

November, 1927

APPENDIX REFERRED TO AT PAGE 27.

[Title Omitted.]

UNITED STATES OF AMERICA,
State and Eastern District of Pennsylvania, } ss.
City and County of Philadelphia.

GEORGE FLINT, SAMUEL W. COLLINS and LUDWIG T. BREHM, being duly sworn according to law, depose and say that they are of full age, citizens and residents of the United States of America, and the Respondents in the above entitled cause.

George Flint further and separately deposes and says that he is a citizen of the State of Pennsylvania, and resides in Philadelphia, Pennsylvania; that at all times since a date prior to January 1st, 1917, he has been a citizen and resident of the State of Pennsylvania; and that he never has been and is not now a citizen or resident of the Southern District of New York or of the State of New York.

Samuel W. Collins further and separately deposes and says that he is a citizen of the State of New Jersey, and resides in Riverton, New Jersey; that at all times since a date prior to January 1st, 1917, he has been a citizen and resident of the State of New Jersey; and that he never has been and is not now a citizen or resident of the Southern District of New York or of the State of New York.

Ludwig T. Brehm further and separately deposes and says that he is a citizen of the State of Pennsylvania, and resides in Newtown Square, Pennsylvania; that at all times since a date prior to January 1st, 1917, he has been a citizen and resident of the State of Pennsylvania; and that he never

has been and is not now a citizen or resident of the Southern District of New York or of the State of New York.

GEORGE FLINT
SAMUEL W. COLLINS
LUDWIG T. BREHM

Sworn and subscribed to before me this 18th day of November, A. D. 1927.

H. W. BAIRD
Notary Public.
Commonwealth of Pennsylvania.
My Commission expires March 6, 1931.
[NOTARIAL SEAL.]